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IN THE

Supreme Court of the United States

No. 815

STRACHAN SHIPPING COMPANY, *Petitioner*

-versus-

KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N. V., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT EIKEL
205 Oil & Gas Building
Houston, Texas 77002
Attorney for Petitioner

Alpha Law Brief Co., 402 M & M Bldg., Houston 2

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KONINKLYKE NEDERLANDSCHE STOOMBOOT MAATSCHAPPY, N. V., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Strachan Shipping Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is printed *infra*, Appendix p. 11 et seq. The opinion of the United States District Court is reported at 205 F. Supp. 295 (and a supplemental opinion at 223 F. Supp. 102) and is reproduced *infra*, Appendix p. 15 et seq. (the supplemental opinion at Appendix p. 22 et seq.).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 14, 1963. (It was stayed by order of said Court on January 3, 1964.) Copies of said judgment and order are printed *infra* Appendix p. 26 et seq.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C., Sec. 1254(1).

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether a party in a civil suit can recover attorneys' fees and expenses from its adversary where there is no contractual agreement nor a statutory enactment allowing such recovery?

2. Whether a steamship operator, free of all liability in a longshoreman's suit, can recover from the stevedore its attorneys' fees and expenses incurred in its successful defense of the suit brought by a longshoreman against it for injuries allegedly caused by the unseaworthiness of its vessel, where the stevedore in no way by contract agreed to pay such costs and was impleaded by the shipowner only because of the warranty implied by law to perform its services in a workmanlike manner?

STATEMENT

The circumstances of this matter were these:

A longshoreman employed by petitioner to load cargo aboard respondent's ocean-going vessel the SS OBERON was injured. R. 19, 20. The longshoreman received compensation from petitioner's insurer (petitioner being in-

sured pursuant to the terms of the Longshoremen's and Harbor Workers' Compensation Act). R. 21.

The longshoreman then sued respondent for damages, alleging negligence and unseaworthiness of its vessel. He alleged damages in the amount of $75,000, exclusive of interest and costs, and diversity of citizenship, thus invoking the jurisdiction of the District Court under the Act of June 25, 1948, c. 646, 62 Stat. 930, Title 28, U.S.C., Sec. 1332(a)(2), amended July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub. L. 85-554, Sec. 2, 72 Stat. 415. R. 4-7.

In this suit petitioner as stevedore was impleaded by the respondent shipowner, which claimed it had a right to be indemnified against any liability to the longshoreman. This right to indemnification allegedly arose from breach of petitioner's implied warranty as stevedore to perform its stevedoring services in a good and workmanlike manner. R. 10-14. There was no written indemnity agreement between the parties, petitioner having made no agreement of any kind to indemnify respondent for expenses or costs it might incur in defending such a longshoreman's suit.

Upon a jury verdict judgment was entered that the longshoreman take nothing against respondent. The trial court granted recovery to the respondent of its attorneys' fees and expenses however because to one question submitted the jury answered that the accident happened through petitioner's failure to use the ship's loading facilities properly. The trial court reasoned that petitioner by its actions had caused respondent to incur attorneys' fees and expenses and should consequently indemnify it for such expenses. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

It is respectfully urged that the writ should be granted for the following reasons:

1. The allowance of attorneys' fees and expenses to a prevailing party where there is no express contractual agreement between the parties providing that they should be recovered (nor any statute pursuant to which they are recoverable) is gross and manifest error, directly contrary to the settled American law. This manifest error of the courts below should be corrected:

The Court of Appeals for the Fifth Circuit has itself followed the settled American rule that absent agreement there can be no recovery by the winning party of attorneys' fees and the decision here is therefore directly contrary to that Court's own holdings. Please see *United States Fidelity & Guaranty Co. v. Highway Engineering Co.*, 5 Cir. 1931, 51 F.2d 894, cert. den. 284 U.S. 669, where at p. 897 the Court stated the prevailing American rule thus:

> "*Attorneys' fees are recoverable only where they have been provided for in advance, either by agreement or by a valid statute.* The agreement in suit made no provision for attorneys' fees, nor can the statute which authorizes the collection of attorneys' fees in suits upon insurance policies (Comp. Gen. Laws Fla. 1927 §6220), Hartford Fire Ins. Co. v. Wilson & Tommer (C.C.A.) 4 F.2d 835, be availed of. The contract in question was not an insurance contract, and the invoked statute does not cover this case. Union Indemnity Co. v. Vetter (C.C.A.) 40 F.2d 606." (Emphasis ours.)

The cited case of *Union Indemnity Co. v. Vetter*, 5 Cir. 1930, 40 F.2d 606 is a like holding, as is *Woodmen of the World Life Ins. Soc. v. Jackson*, 5 Cir. 1957, 243 F.2d 558.

The settled American rule has been of course discussed and followed by this Court. Please see *Tullock v. Mulvane*, 1902, 184 U.S. 497, 22 S. Ct. 372.

2. To correct the manifest error of the Court of Appeals in extending the stevedore's obligation to indemnify the shipowner against liabilities imposed upon the shipowner by breach of the stevedore's implied warranty to perform the stevedoring services in a workmanlike manner, to include attorneys' fees and expenses incurred in successfully defending a longshoreman's suit where no liability was imposed on the shipowner:

The decisions of the courts below here wholly fail to appreciate and to recognize the distinction between an obligation imposed by law to indemnify against *liability* for breach of an implied warranty and the obligation to indemnify against *damages*, which would of course include *costs and expenses* assumed by contract.

They violate as well the settled rules of law governing proximate cause.

The decisions of this Court, upon which these suits by shipowners against stevedores for indemnity against longshoremen's suits are based, have clearly and distinctly held that the stevedore's obligation to indemnify the shipowner for breach of the implied warranty to perform stevedoring services in a workmanlike manner is simply a part of the general rules of the law of indemnity, a common-law indemnity arising out of contract. This is the clear holding of the initial decision in *Ryan Stevedor-*

ing Co., Inc. v. Pan-Atlantic Steamship Corporation, 1955, 350 U.S. 124, 76 S.Ct. 232, as is pointed out in the dissenting opinion in that case. Please see also *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 1958, 355 U.S. 563, 78 S.Ct. 438.

Petitioner respectfully emphasizes that this is not a case where the parties had a *written contractual agreement* by which the stevedore expressly undertook to indemnify the shipowner against liabilities, including damages and costs such as admittedly are the attorneys' fees and expenses here, which by his negligent acts the stevedore might cause to be imposed upon the shipowner. No criticism is made of the holdings of cases where there was such an express agreement, such as *Gonzalez v. Pennsylvania Railroad Company*, S.D. N.Y., 1960, 183 F. Supp. 779, *California Tanker Company v. Todd Shipyards Corporation*, S.D. N.Y., 1962, 206 F. Supp. 872, and *Lilleberg v. Pacific Far East Line, Inc.*, N.D. Calif., 1958, 167 F. Supp. 3.

Nor is the case here one where the negligence of the stevedore has imposed *liability* upon the shipowner, such as is the *Paliaga* case (*Paliaga v. Luckenbach Steamship Company*, 2 Cir. 1962, 301 F.2d 403), relied on by the courts below, that case being simply one where the shipowner's liability was established by a compromise short of verdict and the court awarded the shipowner in addition to the amount of his liability also his attorneys' fees and expenses. See also *DeGioia v. United States Lines Company*, 2 Cir., 1962, 304 F.2d 421; *American Export Lines, Inc. v. Atlantic & Gulf Stevedores*, 4 Cir., 1963, 313 F.2d 414; *Brown v. San Alberto Cia Armadora*, 3 Cir., 1962, 305 F.2d 602; *Damanti v. A/S Inger*, 2 Cir., 1963, 314 F.2d 395; *Shannon v. United States*, 2 Cir., 1956, 235 F.2d 457.

On the contrary, the case here is simply one where the shipowner *had no liability to be indemnified against:* the trial court pursuant to the jury verdict so held. It therefore had no right to indemnity under the settled law governing a party's right to indemnity.

Please see *Chicago, R. I. & P. R. Co. v. Dobry Flour Mills, Inc.*, 10 Cir., 1954, 211 F.2d 785, *Lee Way Motor Freight, Inc. v. Yellow Transit Freight Lines, Inc.*, 10 Cir., 1957, 251 F.2d 97, 99, and *The Toledo*, 2 Cir., 1941, 122 F.2d 255, cert. den. 314 U.S. 689, 62 S.Ct. 302, cases which state the general rule that a party suing for indemnity must *first* prove that it was legally liable to the injured party. Of course the shipowner-stevedore cases cited above are holdings in conformity with these cases and directly opposed to the decision here appealed from.

The rule that there can be no cause of action for indemnity unless there is liability is clearly reflected by the concomitant rule that the limitations period against an indemnity suit commences to run only from the time that the party is damaged, not from the time of injury to the injured party. *Southern Maryland Oil Company v. Texas Company*, D.C. Md. 1962, 203 F. Supp. 449, and the cases reviewed there.

Further, the decisions below are directly contrary to the following cases in other jurisdictions:

Cimino v. United States of America, S.D. N.Y., 1960 A.M.C. 2120 (Express indemnity agreement which failed to clearly provide for recovery of attorneys' fees upon successful defense);

Nicholson Transit Company v. Great Lakes Towing Company, N.D. Ohio, 1960, 185 F. Supp. 685, 1961 A.M.C. 1919;

Hill v. American President Lines, Ltd., E.D. Va., 1961, 194 F. Supp. 885;

Fox v. The Mormacwind, E.D. Va., 1960, 182 F. Supp. 7, aff'd 4 Cir., 285 F.2d 222.

It is true that after the decision in the trial court here that the district court in the *Hill* and *Fox* cases, *supra*, recanted in *Bielawski v. American Export Lines, Inc.*, E.D. Va., 1963, 220 F. Supp. 265, but petitioner respectfully submits that that change of view is not sound and that the law governing in these cases, following settled principles of indemnity, is correctly stated to the contrary by the court in *Nicholson Transit Company v. Great Lakes Towing Company, supra*, as follows:

> "It is my judgment that expenses and fees for defending an action brought by a third party are not chargeable to an indemnitor unless by express agreement, or as part of the damages for which indemnity is granted."

It seems so obvious as not to merit argument that to justify refusal to follow the general principles of indemnity by pointing to the immaterial answer of the jury that the stevedore-petitioner's actions caused the accident and hence proximately caused the respondent to incur legal fees and expenses in defending a suit by the longshoreman is to disregard settled rules of proximate cause: The suit was filed by the voluntary act of an independent third party; it was this act of filing the suit, *not the accidental injury*, which proximately caused the expenses of defense here. Please see the holding to such effect in *Matson Navigation Company v. United States of America*, N.D. Calif., 1959, 173 F. Supp. 562, 563.

Finally, no ground of public policy can justify imposing this additional burden upon the stevedore effectively denied through the indemnity doctrine the protection verbally accorded him by the Longshoremen's and Harbor Workers' Compensation Act. The Court is respectfully referred to the description of the stevedore's position in such cases embodied in the dissent in *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corporation*, supra, and recently described in even greater detail by Circuit Judge Brown of the Court of Appeals for the Fifth Circuit in his dissenting opinion, where in reviewing the decisions since the *Ryan* case he characterizes this decision here appealed from as "one of first impression." Please see *Strachan Shipping Company v. Melvin, et al.*, No. 19753, decided January 7, 1964.[1]

CONCLUSION

Petitioner Strachan Shipping Company therefore respectfully prays that this petition for writ of certiorari be granted and that the decision and judgment of the Court of Appeals be in all things reversed with instructions that the cause be remanded to the District Court for entry of judgment that respondent herein take nothing of and from petitioner on the third-party suit, and that petitioner recover its costs herein expended.

Respectfully submitted,

ROBERT FIKEL
205 Oil & Gas Building
Houston, Texas 77002
Attorney for Petitioner

[1] The pertinent language is printed infra, Appendix p. 30.

CERTIFICATE OF SERVICE

I hereby certify that service of the within petition for writ of certiorari was made upon Messrs. Eastham, Watson, Dale & Forney, 1201 Mellie Esperson Building, Houston, Texas, attorneys for respondent, by mailing copy of the same to them at their address shown, this _____ day of February, A.D. 1964.

ROBERT EIKEL

APPENDIX

OPINION OF THE COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 20371

STRACHAN SHIPPING COMPANY, ET AL.,
Appellants,

versus

KONINKLYKE NEDERLANDSCHE STOOMBOOT MAATSCHAPPY, N. V., *Appellee.*

Appeal from the United States District Court for the Southern District of Texas.

(November 14, 1963.)

Before HUTCHESON and GEWIN, Circuit Judges, and HOOPER, District Judge.

GEWIN, Circuit Judge: This appeal presents a case of first impression for this Court. The problem to be resolved is whether a shipowner is entitled to recover from the stevedore, a third party defendant, attorneys' fees and expenses for defending a suit by an injured longshoreman where the jury made the following find-

ings in answer to specific interrogatories propounded by the court: (a) the shipowner was blameless, was not guilty of negligence and the ship was not unseaworthy; (b) the proximate cause of the injury was the stevedore's failure to perform its duties in a safe and workmanlike manner because it made improper use of the ship's loading facilities; and (c) the plaintiff longshoreman was injured. In answer to the interrogatory as to whether the failure of the stevedore to load the cargo in a safe and workmanlike manner was a proximate cause of plaintiff's injury, the jury answered: "Yes. We feel that the extent of this injury does not warrant any compensation." The trial court awarded to the shipowner that part of his attorneys' fees that were incurred in defending against the longshoreman's claim, but refused to award any attorneys' fees incurred in "getting the stevedore into the case and establishing that the stevedore, rather than the shipowner, was responsible. . . ." F. Supp.

We cannot follow the argument of the stevedore that it is not liable because there was no express contract of indemnity, ". . . but only an obligation or warranty implied by law *to perform its services properly*." (emphasis added) It is contended that to extend such warranty to cover attorneys' fees incurred in a successful defense of a longshoreman's claim would cast an intolerable burden on the stevedore. It would require the stevedore to foot the bill for all claims, however groundless, and would hold him responsible for the actions of a third party over whom he has no control. The short answer to such arguments is that the jury found that the stevedore *did not*

[1] Ryan Stevedoring Co. v. Pan Atlantic S.S. Co., 350 U.S. 124, 100 L. Ed. 133 (1955).

perform its services properly. If it had done so, there would have been no lawsuit of the kind here involved. Breach of an implied contract stands on the same footing as breach of an express contract in the circumstances of this case. *Gonzalez v. Penn. RR Co.*, (S.D. N.Y. 1960) 183 F. Supp. 779.

Among other cases, the court below relied heavily on *Paliaga v. Luckenbach Steamship Co.*, 2 Cir. 1962, 301 F.2d 403, a case very similar to the one at bar. It was there held that after the stevedore had settled with the longshoreman while trial was in progress, the court should have continued with the trial of the case for the purpose of determining the shipowner's claim against the stevedore for attorney's fees. The stevedore here claims that all of the authorities relied on by the trial court are distinguishable, and it centers its attack particularly on the trial court's interpretation of the decision in the *Paliaga* case. The distinction, argues the stevedore, is that the act of effecting a settlement by the stevedore in *Paliaga* resulted in ". . . thus acknowledging that it had in all likelihood exposed the shipowner to liability by creating or activating an unseaworthy condition on the vessel, which was the only issue still under consideration by the jury at the time of the settlement." It is true that the jury failed to find unseaworthiness in the instant case, but it did find that the stevedore was the guilty party and that its conduct was the proximate cause of the injury. It seems to us that such a finding by the jury creates a stronger argument that the conduct of the stevedore "in all likelihood exposed the shipowner to liability," than did the fact of settlement in *Paliaga*. The cause of the exposure in this case is definitely tied to the conduct of the stevedore. Reality in this case

gives stronger support for the position of the shipowner than did probability or "likelihood" in the *Paliaga* case. A finding by the jury ought to carry as much weight as an acknowledgement of a probability.

Finally, the stevedore, viewing the case with keen hindsight, contends that "The plaintiff's suit here was completely without merit." We must view the case not only with hindsight but also with foresight. We cannot overlook the finding of the jury that the ship was entirely blameless; nor its finding that the stevedore failed to perform its duties in a safe and workmanlike manner. The plaintiff's suit was not completely without merit. It must be appraised to some extent, at least, by the appearance of things before the case was tried. The facts were as well or better known to the stevedore than they were to the shipowner. The defense of the case was declined by the stevedore.

The conclusion here reached is limited to the facts of this case wherein the jury failed to find unseaworthiness or negligence on the part of the shipowner, but did find that the stevedore failed to discharge its duties in a safe and workmanlike manner because it failed to use the ship's loading facilities properly, which was the proximate cause of the plaintiff's injury. We fully concur in the clear and logical opinion of District Judge Ingraham.

Judgment AFFIRMED.

OPINION OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
Southern District Of Texas
Houston Division

CLARENCE J. CASWELL, Plaintiff,

vs.

KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N. V.,
Defendant and Third Party Plaintiff,

vs.

STRACHAN SHIPPING COMPANY,
Third Party Defendant.

CIVIL ACTION NO. 13,723

W. Jiles Roberts, of Houston, Texas; for plaintiff.

Eastham, Watson, Dale & Forney, of Houston, Texas; for defendant and third party plaintiff.

Robert Eikel and Theodore Goller, Jr., of Houston, Texas; for third party defendant.

JUNE 5, 1962

Memorandum:

Plaintiff longshoreman sued defendant shipowner for $75,000 damages for personal injury, alleging unseaworthiness of the vessel and negligence of the vessel's personnel. Defendant denied these allegations and claimed the injury

resulted from a breach of warranty of workmanlike service by the stevedore, Strachan Shipping Company. On September 15, 1961, defendant shipowner, by its attorneys of record, wrote the stevedore tendering the defense of this suit to it. The stevedore refused to accept the defense, whereupon it was impleaded as a third party defendant by the shipowner. Upon trial, the jury held defendant-third party plaintiff blameless, but in answer to special interrogatories, further held that the third party defendant had failed to perform its duties in a safe and workmanlike manner in that it made improper use of the ship's loading facilities, which was the proximate cause of plaintiff's injury.

Three motions are now before the court, *viz:* plaintiff's motion for new trial; defendant's motion for judgment, including recovery over against the third party defendant of costs and attorney's fees reasonably incurred in the defense of the suit; and third party defendant's motion for judgment, including the provision that third party plaintiff take nothing from third party defendant.

Plaintiff's motion for new trial is without merit, and will be denied. The motions presented by the shipowner and the stevedore raise but one issue—whether or not a third party plaintiff is entitled to recover expenses and attorneys' fees over against a third party defendant where the third party plaintiff has successfully defended against a suit for injury for which the jury found the third party defendant solely responsible.

The law is clear that a stevedore's breach of warranty to conduct its activities in a safe and workmanlike manner, resulting in injury to a longshoreman for which the shipowner is held liable, gives rise to a right of indemnity from the stevedore. *Ryan Stevedoring Co. v. Pan Atlantic*

Steamship Co., 350 U.S. 124 (1956). And, as an incident to this recovery over against the stevedore, the shipowner also may recover expenses and attorneys' fees reasonably incurred in the defense of the action. See, *e.g.*, *Drago v. A/S Inger*, 194 Fed.Supp. 398, 409 (D.C.E.D.N.Y. 1961); *Holley v. The Manfred Stansfield*, 186 Fed.Supp. 805, 809 (D.C. E.D. Va. 1960). Thus, if here, the stevedore's breach of warranty had rendered the vessel unseaworthy, or even activated a preexisting unseaworthy condition, the longshoreman could have recovered against the shipowner who, in turn, would be entitled to indemnity from the stevedore, including costs and attorneys' fees. There appears to be no logical basis for distinguishing between a successful and an unsuccessful defense on the part of the shipowner, to the end that costs and attorneys' fees may be recovered as a normal element of indemnity in the latter—where the shipowner is held liable for the negligence of the stevedore—but not at all in the former—where the shipowner is not held liable for the negligence of the stevedore. In either instance, the shipowner is put to the time and expense of defending against an action which springs from an injury occasioned by the acts or omissions of the stevedore; in either instance, the stevedore has breached its obligation to the shipowner which has resulted in a loss to the shipowner.

On several occasions, district courts have denied recovery of attorneys' fees and costs where the shipowner was not found primarily liable to a third party for the stevedore's breach. See, *e.g.*, *Hill v. American President Lines, Ltd.*, 194 Fed.Sup. 885 (D.C.E.D. Va. 1961); *Nicholson Transit Co. v. Great Lakes Towing Co.*, 185 Fed.Supp. 685 (D.C. N.D. Ohio 1960); *Fox v. The S.S. Moremacwind*, 182 Fed.Supp. 7 (D.C.E.D. Va. 1960). In general, these courts

have held that where the shipowner successfully defends against a suit by a longshoreman, expenses and attorneys' fees are but a cost of doing business. See *Fox v. The S.S. Moremacwind*, supra, at 12. Patently, this is not a *reason* for denying recovery of the costs of litigation over against the third party defendant stevedore; this is no more than a restatement of the courts' conclusion denying recovery.

Other district courts have denied recovery for reasons which are not applicable here. For example, in *Deans v. Kihlstrom*, 197 Fed.Supp. 339 (D.C.E.D. Va. 1961), the court concluded that "*in the absence of a willingness to abandon the defense of the original action*, the right to recover over for attorneys' fees and expenses must be dependent upon a recovery directing payment by the shipowner." 197 Fed.Supp. at 340 (emphasis supplied). The missing element which led to a denial of recovery in the *Deans* case is present in the instant case, where the shipowner made a specific offer to abandon the defense of the action prior to the actual trial.

In the case of *Gonzales v. Pennsylvania Railroad Company*, 183 Fed.Supp. 779 (D.C.S.D. N.Y. 1960), after the jury returned a verdict in favor of the shipowner and against the plaintiff longshoreman, the court held that the shipowner could recover expenses and attorneys' fees over against the third party defendant stevedore. Although the court primarily based its decision on a general indemnity clause in the contract between the stevedore and the shipowner, it correctly stated that a third party defendant stevedore may be held responsible for payment of a defendant shipowner's attorneys' fees even in the absence of a written indemnity agreement. The court further stated "nor would it be reasonable to relieve Spencer (stevedore)

of an obligation that would otherwise attach because the Railroad (shipowner) was successful in resisting plaintiff's 'claim for damages'." 183 Fed.Supp. at 781 (explanation added).

Apparently, the appellate courts have only twice been called upon to determine the right to recover over attorneys' fees and expenses where the original action against the shipowner failed. In *McCall v. Overseas Tankship Corporation*, 222 F. 2d 441 (2d Cir. 1955), a case quite dissimilar factually from the one at bar, the court denied recovery of attorneys' fees over against a third party defendant airline, where the shipowner successfully defended against an action based on the Jones Act. The court found there was no warranty running from the third party defendant to the third party plaintiff, no specific contract for indemnity, and hence, no foundation upon which to rest a claim for attorneys' fees and costs.

The most recent and most analogous appellate authority is consistent with recovery over of attorney's fees and expenses in the instant case. In *Paliaga v. Luckenbach Steamship Company*, No. 26896 (2d. Cir. March 22, 1962), a shipowner was sued for injuries to a longshoreman. The stevedore was impleaded, and the case went to the jury on the issue of unseaworthiness. While the jury was deliberating, the stevedore settled with the longshoreman, who then, with prejudice, dismissed his case against the shipowner. The shipowner sought to have the trial continued on its third party claim against the stevedore for attorneys' fees and expenses, but the trial court denied its motion. Appeal was taken, and the circuit court stated the questions to be decided thusly:

> "First, does the stevedore have a contractual obligation to reimburse the shipowner for its litigation expenses, even though the stevedore has settled and paid the longshoreman's claim against the shipowner after trial has begun but prior to a judgment against the shipowner; and, second, if the stevedore does have such an obligation, was it an abuse of discretion in the present case for the trial court to have refused to hear the shipowner's claim for these expenses?"

The court examined the contract between the stevedore and the shipowner and found no express indemnity clause. Nevertheless, it found that the indemnitee-indemnitor relationship was implicit in the contract. In the language of the court:

> "If the stevedore failed to use reasonable care in handling either equipment or cargo *and this failure results in foreseeable loss to the shipowner by rendering it likely to suit by an allegedly damaged party*, such as a shipper, or a suit by an injured seaman, or even to suit by an injured longshoreman in the stevedore's own employ, the stevedore company has breached its obligation to the shipowner under the contract." (emphasis supplied).

In this context, the district court's order was reversed and the cause was remanded to determine whether or not the stevedore breached its warranty of workmanlike service, thereby precipitating the original action against the shipowner. If, on remand of the Paliaga case, it is found that the stevedore breached its warranty, then the shipowner can recover over attorneys' fees and expenses. The court did not circumscribe the shipowner's right of recovery to a finding that the stevedore's breach rendered the vessel unseaworthy, for which the shipowner would have been

answerable if the original action had continued to a jury verdict. From the language of the opinion, it is clear that the shipowner can recover attorneys' fees and expenses if it is found that the stevedore's breach rendered the shipowner "likely to suit," irrespective of the shipowner's primary liability to answer in damages to third parties therefor.

In the case at bar, there was both a pre-trial offer to relinquish defense of the suit to the stevedore, and specific jury findings that plaintiff's injury resulted from the stevedore's breach of the warranty of workmanlike service. Under these circumstances, this court concludes that the third party plaintiff-shipowner is entitled to recover its reasonable expenses and attorneys' fees from the third party defendant-stevedore.

The parties are directed to stipulate reasonable expenses and attorneys' fees within ten days. In the event of failure to so stipulate, the case will be set for trial upon such issues.

JOE INGRAHAM
United States District Judge

SUPPLEMENTAL OPINION OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
Southern District Of Texas
Houston Division

CLARENCE J. CASWELL, Plaintiff,
vs.
KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N. V.,
Defendant and Third Party Plaintiff,
vs.
STRACHAN SHIPPING COMPANY,
Third Party Defendant.

CIVIL ACTION NO. 13,723

W. Jiles Roberts, of Houston, Texas; for plaintiff.

Eastham, Watson, Dale & Forney, of Houston, Texas; for defendant and third party plaintiff.

Robert Eikel and Theodore Goller, Jr., of Houston, Texas; for third party defendant.

OCTOBER 30, 1962

Memorandum:

This memorandum deals with the last unresolved issue growing out of a damage suit by Clarence J. Caswell, a

longshoreman, against Koninklyke Nederlandsche Stoomboot Maalschappy, N.V., the shipowner, who in turn impleaded Strachan Shipping Company, the stevedore. For a statement of the facts and the decision of the court on other issues in this case see 205 Fed. Supp. 295. In that memorandum the court answered in the affirmative the question, "Is the third party plaintiff entitled to recover expenses and attorney's fees over against a third party defendant where the third party plaintiff has successfully defended against a suit for injury for which the jury found the third party defendant solely responsible?" After the foregoing question was answered the shipowner and the stevedore were unable to agree on the amount of the fees and expenses for which the stevedore was liable. Therefore the court held a hearing for the sole purpose of ascertaining the amount of the stevedore's liability.

The evidence taken at the hearing established the following: Shipowner's counsel spent 104 hours on this case and incurred expenses of $1,892.66. Of that total approximately 26 hours and $861.80 of the expenses were spent on getting the stevedore into the case and establishing that the stevedore, rather than the shipowner, was responsible for the plaintiff's injury, and finally that in Houston an attorney of the experience and stature of shipowner's counsel commands $25-$35 an hour for a tort claim of this type.

The stevedore argues that unless the contract of indemnity says otherwise, and it does not in this case, he should only be held liable for the shipowner's expenses incurred in defending against the longshoreman's claim. The court agrees with this argument. In effect the stevedore is contending that the shipowner's expenses in this suit be

broken down into three categories; expenses incurred in defending against the plaintiff's claim for damages, expenses incurred in impleading the third party defendant, and expenses incurred in trying to prove that liability, if there is any, should be borne by the third party defendant. The great weight of authority supports such a division. See, e.g., *Paliaga v. Luckenback Steamship Co.*, (2d Cir. 1962), 301 F. 2d 403, 409; *General Electric Co. v. Mason & Dixon Lines, Inc.* (D.C.W.D. Va. 1960), 186 Fed. Supp. 761. The only case that the shipowner cites in support of its contention that the stevedore is liable for the total attorney's fees is *Vaughan v. Atkinson*, 369 U.S. 527. In that case the Supreme Court allowed a seaman to recover the attorney's fees he paid incident to bringing a suit for maintenance and cure. Even though that case involved a seaman, historically the ward of the court, the Supreme Court recognized a need to find that the defendant had acted callously toward the plaintiff before bringing into play its inherent equitable power. The facts of the case at hand do not require such a drastic remedy.

In addition to the authorities just quoted there are good reasons for limiting the amount of recovery allowed the shipowner. It is true that the stevedore is indemnitor for the ship but he is only a limited indemnitor, for unless his fault is proved the ship cannot recover over in the third party action. Thus, in this respect, the shipowner and the stevedore are opposing parties. This being so, the stevedore should not have to pay the shipowner that part of the fee that was used to show the stevedore's liability. To put this another way, it would seem that even if the stevedore accepted the task of defending the long

shoreman's suit the shipowner would still have the expense of staying in the suit for the purpose of showing that the stevedore is liable.

Furthermore to extend the indemnity to include the cost of impleading the stevedore would mean that the cost of enforcing a legal right would be shifted from the right holder to the party that has breached its duty. The well-settled rule in the United States is that, in general, one suing on a contractual right pays the attorney's fees incident to enforcing that right. See 42 Corpus Juris Secundum §87, Indemnity, Sec. 13d. Thus it seems to the court that this is the proper rule to apply under the circumstances here.

Shipowner will be allowed recovery for 78 of the 104 hours at the rate of $30 per hour, plus expenses and disbursements advanced in the sum of $1,030.86, for a total amount of $3,370.86.

The clerk will notify counsel to draft and submit appropriate order.

JOE INGRAHAM
United States District Judge

JUDGMENT OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
For The Fifth Circuit
October Term 1963

No. 20,371

D.C. Docket No. 13723 Civil

STRACHAN SHIPPING COMPANY, ET AL.,
Appellants,

vs.

KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N.V.,
Appellee.

Appeal from the United States District Court for the Southern District of Texas

---

Before HUTCHESON and GEWIN, Circuit Judges, and HOOPER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, Strachan Shipping Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

November 14, 1963

Issued as Mandate:

ORDER RECALLING MANDATE

IN THE UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 20,371

STRACHAN SHIPPING COMPANY, ET AL.,
Appellant

vs.

KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N.V.,
Appellee.

Appeal from the United States District Court for the Southern District of Texas

---

Before HUTCHESON and GEWIN, Circuit Judges, and HOOPER, District Judge.

ON CONSIDERATION of the motion of appellant for recall and stay of judgment issued as mandate in the above numbered and entitled cause, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States,

IT IS ORDERED that the judgment issued as mandate to the Clerk of the United States District Court at Houston, Texas, on December 12, 1963, be recalled and stayed to and including February 12, 1964, the stay to continue in force until the final disposition of the case by the

Supreme Court; provided that within said period there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed.

IT IS FURTHER ORDERED that the Clerk shall issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ; or upon the expiration of the above period unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

(ORIGINAL FILED — JANUARY 3, 1964)

BROWN, J., NO. 19,753, IN THE COURT OF APPEALS FOR THE FIFTH CIRCUIT, STRACHAN SHIPPING COMPANY v. MELVIN, ET AL.

First, by filing the lawsuit against the vessel, the plaintiff's counsel precipitated an impleader action for indemnity against the stevedore which was actually filed. The best the stevedore-employer could hope for was a complete victory, that is, a denial of the shipowner's impleader. But such a victory would not be cheap. Obviously in such impleader suit, the stevedore could not turn its defense over to the worker's counsel since the facts to sustain the plaintiff's recovery against the vessel owner would very likely give rise to an automatic right of indemnity by shipowner against stevedore.[16] Consequently, even the eventuality of an outright denial of the shipowner's indemnity claim, would mean large expenditures by the stevedore for its own counsel's fees in defense of the impleader.

Second, if the injured worker recovered damages and the stevedore was held to have breached its warranty of workmanlike performance, the stevedore would have to indemnify the vessel owner for the full amount of the plaintiff's judgment notwithstanding the exclusive liability provision of the Longshoremen's Act. §905.

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[16] The complaint alleged that the vessel was unseaworthy (or the vessel negligent) because the hatch tender had to stand on a jury-rigged temporary platform of hatchboards resting on permanent deck pipes. The answer and impleader asserted that this "unseaworthy" condition was due to purposeful action of the supervisory personnel of the stevedore.

Third, after paying the total judgment for the worker's damages, the stevedore would also be liable under the indemnity for the attorney's fees and expenses incurred by the vessel owner in defending the worker's suit. At that point the stevedore will thus have paid (a) its own counsel's fees and (b) those of the defendant-vessel owner. But it does not end there, for it is possible for the vessel owner to defeat the claim of the worker and still recover from the stevedore the legal expenses and fees incurred by the shipowner in the defense of the main suit.[17]

Thus the best the stevedore can come out for is its own attorney's fees, with a strong likelihood that it will have to pay those of the defendant shipowner, and may well end up paying those of the injured worker's counsel as well.[18] A rule producing that remarkable result is surely open to question.

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[17] In Strachan Shipping Company v. Koninklyke Nederlandsche Stoomboot Maalschappy, N.V., 5 Cir., 1963 ... F.2d ... 1963 AMC ... [No. 20371, November 14, 1963], this Court in "a case of first impression" on the basis of a jury finding of nonworkmanlike performance holds the stevedore liable to indemnify the shipowner-defendant for the shipowner's legal expense and fees even though the defense was successful and resulted in the denial of all relief to the injured worker.

Office-Supreme Court, U.S.
FILED
APR 16 1964
JOHN F. DAVIS, CLERK

NO. 815

IN THE

Supreme Court of the United States

October Term, 1963

STRACHAN SHIPPING COMPANY, *Petitioner*

-versus-

KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N. V., *Respondent*

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT EIKEL
205 Oil & Gas Building
Houston, Texas 77002
Attorney for Petitioner

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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NO. 815

IN THE

Supreme Court of the United States

October Term, 1963

STRACHAN SHIPPING COMPANY, *Petitioner*

-versus-

KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N. V., *Respondent*

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:

Petitioner Strachan Shipping Company respectfully petitions this Honorable Court for a rehearing of its order entered herein on March 23, 1964, denying the petition for writ of certiorari, and again prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, as prayed for in the petition filed herein February 7, 1964, and would respectfully show that substantial grounds therefor exist, although not previously presented, as follows:

Grounds For Allowing Rehearing And Grant of Certiorari

There is no basis in the decisions of this Honorable Court or of any court of the several states for the holding that a litigant must pay the attorneys' fees and expenses of litigation of his adversary, and the settled American rule, uniformly applied by the appellate courts of every state in which the matter has been litigated, is that such expenses are not recoverable unless provided for in advance by agreement or statute.

There is no valid reason for departing from established principles of law in longshoremen's cases. The courts below in this case have fashioned a new rule for such cases which will spread confusion into other areas of the law as well as in admiralty, as the dissenting opinion of Mr. Justice Black emphasizes in the case of *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company, Inc.*, ___ U.S. ___ 84 S.Ct. 748, decided March 9, 1964, and the writ should be granted to correct such fundamental error.

STATEMENT

A longshoreman employed by petitioner, a stevedoring company, brought this action against the respondent shipowner to recover damages for injuries allegedly received as a result of respondent's negligence and the unseaworthiness of its vessel. Petitioner was brought into the suit as a third-party defendant by respondent, which claimed it was entitled to indemnity against any liability to the longshoreman because petitioner allegedly breached its implied warranty to perform its stevedoring services in a good and workmanlike manner.

There was no written indemnity agreement between respondent and petitioner.

Judgment was entered upon a jury verdict that the longshoreman take nothing from the respondent. Despite the fact that the respondent incurred no liability to the longshoreman, the trial court entered judgment on the third-party action that respondent recover its costs, attorneys' fees and expenses from petitioner because the jury found in answer to one question that the accident happened through the petitioner's failure to use the ship's loading facilities properly. The Court of Appeals affirmed.

ARGUMENT

There is not a single decision by an appellate court of any state that petitioner has found which departs from the long-settled American rule of law that a litigant cannot recover from his adversary his own attorneys' fees and litigation expenses, other than ordinary court costs, in the absence of a specific contract or a statute granting such recovery except in certain rare cases where the defendant has acted willfully or maliciously and he is penalized by being required to pay the wronged person's expenses.[1]

This settled American rule of law is uniformly observed; regardless of whether the action is *ex contractu* or *ex delicto*,[2] at law or in equity.[3] The cases hold that attorneys' fees are not recoverable as an item of damages unless

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[1] Appendix, where cases from 41 jurisdictions are listed.

[2] **Baldus v. Mattern**, S.Ct. N.D. 1958, 93 N.W.2d 144, 149; **Hiss v. Friedberg**, S.C.A. Va. 1960, 112 S.E.2d 871, 875.

[3] **Ritter v. Ritter**, S.Ct. Ill. 1943, 381 Ill. 549, 46 N.E.2d 41, 43; **Miura v. Nishimoto**, S.Ct. Haw. 1940, 35 Haw. 595, 606.

provided for by contract or allowed by a specific statute,[4] and allowance as a part of damages without statutory or contractual liability therefor has been held to be contrary to public policy.[5]

Even in jurisdictions where the plaintiff's litigation expenses are imposed by statute as a penalty upon the defendant who has acted in bad faith, the plaintiff cannot recover his attorneys' fees as part of the compensatory damages unless he is entitled to recover other compensatory damages besides those fees. *Shemwell v. Graham*, 5 Cir. 1948, 166 F.2d 391, *Smith v. A. A. Wood & Son Company*, Ct. of App. Ga. 1961, 120 S.E.2d 800, 805. This is the common law rule also in cases where there is no statute but where because of malice or fraud punitive damages are recoverable. *United Power Co. v. Metheny*, S. Ct. Ohio, 1909, 90 N.E. 154, 156.

It has been held that even where there is a statute which allows a recovery of attorney fees that such a statute is penal in character and is to be strictly construed, *Van Zandt v. Ft. Worth Press*, S. Ct. Tex. 1962, 359 S.W. 2d 893, 895, reh. denied. In at least one jurisdiction the allowance of counsel fees in favor of a successful litigant was

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[4] **Olmstead v. Rosedale Building & Supply, Inc.**, S.Ct. Ark. 1958, 313 S.W.2d 235, 239; **State v. Bloomfield Const. Co.**, S.C.E. Conn 1840, 11 A.2d 382, 386; **Lyon v. Whitsell**, C.A. Ky. 1951, 245 S.W.2d 926; **Dworsky v. Vermes Credit Jewelry**, S.Ct. Minn. 1955, 69 N.W. 2d 118, 124; **City of Laurel v. Bush**, S.Ct. Miss. 1960, 120 So.2d 149, 155; **Edwards v. Smith**, S.Ct. Mo. 1959, 322 S.W.2d 770, 777; **Miss Susan, Inc. v. Enterprise and Century Undergarment Co., Inc.**, S.Ct. N.Y. 1946, 62 N.Y.S.2d 250, 253, aff'd N.Y.C.A. 1947, 74 N.E.2d 461; **Loeb v Loeb**, S.Ct. Vt. 1958, 144 A.2d 825, 830.

[5] **Thayer v. Wright Company**, C.A. Tenn. 1961, 262 S.W.2d 805, 812, cert. den. by Tenn. S.Ct. 1962

abolished by statute. *Crutchfield v. Foster*, S. Ct. N.C. 1938, 200 S.E. 395, 396.

Here, where petitioner never by contract agreed to bear the respondent's attorneys' fees and legal expenses, no statute allows recovery of such expenses, and respondent incurred no liability and no damages by reason of the longshoreman's suit, the only effect of allowing such recovery is to punish a stevedore who has the courage to defend against what he feels to be an unjust claim.

Moreover, the holdings of the courts below are not only thus contrary to rules of American law heretofore well settled but are glaringly contrary to the express provisions of the Longshoremen's and Harbor Workers' Compensation Act, Mar. 4, 1927, c. 509, § 5, 44 Stat. 1426 (33 U.S.C. 901, et seq.), Section 5 of which in explicit language provides that the liability of an employer under the Act "shall be exclusive . . . of all other liabilities . . . to the employee . . . *and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury . . .*" (emphasis ours). (Here of course petitioner was insured pursuant to the terms of that Act. R. 21.)

By holding that the shipowner is entitled to recover its attorneys' fees and expenses of litigation from the stevedore even though it suffered *no* damages and incurred *no* liability, the courts below have completed the full circle in defiance of this statutory language which provides explicitly that the insured stevedore shall have *no* liability other than for compensation, to *absolute* liability even for the shipowner's expenses of litigation in defending a groundless claim. From being an insured the stevedore has become an insurer.

The decisions below, we respectfully submit, in practical effect impose an indefensible burden upon American stevedores which inures primarily to the benefit of foreign shipowners (who have by far the greatest number of vessels in American ports), contrary to statute and American rules of law. As Mr. Justice Black stated in dissenting from the recent decision of this Court in *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company, Inc.*, ____ U.S.____, 84 S. Ct. 748, decided March 9, 1964, it is also an unwarranted expansion of the general principles of warranty which will undoubtedly cause confusion in other areas of the law as well as in admiralty.

CONCLUSION

Petitioner respectfully submits that the holdings of the courts below are clearly erroneous and contrary to long-established principles of law which have been uniformly applied in all American jurisdictions and contrary to the express terms of the Longshoremen's and Harbor Workers' Compensation Act, and that the petition for writ of certiorari should in justice therefore be granted to assure conformity in longshoremen's cases with the law as to attorneys' fees which prevails in all other cases, at law, in equity and in admiralty.

Respectfully submitted,

ROBERT EIKEL
205 Oil & Gas Building
Houston, Texas 77002
Attorney for Petitioner

CERTIFICATE (Rule 58)

I certify that the within petition for rehearing of the order of the Honorable the Supreme Court of the United States denying the petition for writ of certiorari to issue to the Honorable the Court of Appeals for the Fifth Circuit entered March 23, 1964, is presented in good faith and not for delay and is restricted to the grounds set forth in Rule 58 of the Supreme Court Rules, namely intervening circumstances of substantial effect or other substantial grounds available to petitioner and not previously presented.

ROBERT EIKEL
205 Oil & Gas Building
Houston, Texas 77002
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that service of the within petition was made upon Messrs. Eastham, Watson, Dale & Forney, 1201 Mellie Esperson Building, Houston, Texas, attorneys for respondent, by mailing copy thereof to them this ____ day of April, A. D. 1964.

ROBERT EIKEL

APPENDIX

ALABAMA: *Taylor v. White*, S.Ct. Ala. 1939, 188 So. 232, 233

ARIZONA: *United States Fidelity & Guaranty Co. v. Frohmiller*, S.Ct. Ariz. 1951, 227 P.2d 1007, 1008

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MONTANA: *Smith v. Fergus County*, S.Ct. Mont. 1934, 39 P.2d 193, 195

NEBRASKA: *Shepherd v. Shepherd*, S.Ct. Neb. 1944, 15 N.W.2d 195, 198

NEW HAMPSHIRE: *Guay v. Brotherhood Bldg. Ass'n*, S.Ct. N. H. 1935, 177 A. 409, 412

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